(2)

No. 89-222

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

SAMUEL JOE PIRAINO,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. On appeal of Piraino's conviction for voluntary manslaughter, the court of appeals reformed the judgment to delete the finding of use of a deadly weapon, based on *Ex parte Patterson*, 740 S.W.2d 776 (Tex. Crim. App. 1987), which was decided two months after Piraino's trial; thereafter, the Texas Court of Criminal Appeals reversed the court of appeals and reinstated the finding of use of a deadly weapon, based on *Ex parte Beck*, 769 S.W.2d 525 (Tex. Crim. App. 1989), which modified *Patterson*. Did the application of *Ex parte Beck* to Piraino's appeal deprive him of due process?

2. Whether the trial court's *Allen* charge violated the Due Process Clause of the Fourteenth Amendment by denying Piraino a fair and impartial trial?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

The opinion of the court of appeals is attached to the petition as an appendix (A 4-14), *Piraino v. State*, No. 01-87-00699-CR, as is the opinion of the Texas

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[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Piraino."

Court of Criminal Appeals (A 1-3). *Piraino v. State*, No. 1150-88.

JURISDICTION

Piraino seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C.§ 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Piraino relies on the *Ex Post Facto* Clause of the United States Constitution, Art. 1, § 9, cl.3; Art. I, § 10, cl. 1, as well as the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

The state is in substantial agreement with Piraino's statement of the case. The state would simply add the additional information that Piraino was sentenced on August 19, 1987, and that *Ex Parte Patterson* was decided on October 21, 1987.

SUMMARY OF ARGUMENT

There are no special or important reasons to consider the questions presented.

There is no merit to Piraino's claim that he was denied due process by the retrospective application of a judicial decision. The decision which was applied to Piraino's appeal represents substantially the same rule of law which obtained at the time Piraino committed the offense for which he was convicted. Hence, he was not deprived of fair notice when his conviction was affirmed on the basis of that decision.

There likewise is no merit to Piraino's complaint about the *Allen* charge which the court gave to the jurors. The charge was not inherently coercive and did not, by its terms, compel the lone dissenter to accede to the views of the eleven other jurors.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Piraino has advanced no special or important reason in this case, and none exists.

II.

THE APPLICATION OF *EX PARTE BECK*, 769 S.W.2D 525 (TEX. CRIM. APP. 1989), TO PIRAINO'S APPEAL DID NOT DEPRIVE HIM OF DUE PROCESS.

It is settled that the retrospective application of judicial decisions may result in a denial of due process that is akin to violations of the *Ex Post Facto* Clause. The rationale of these cases is that individuals are thereby deprived of the notice to which they are entitled if they are to conform their conduct to the requirements of the law. *See, e.g., Marks v. United States*, 430 U.S. 188, 195 (1977) (retrospective application of pornography standards of *Miller v.*

California, 413 U.S. 15 (1973), deprived petitioner of "fair warning"); *Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964) (petitioners not given "fair warning" of unforeseen judicial construction of trespassing statute).

Under the facts of the instant case, Piraino cannot claim a lack of notice. Prior to the Court of Criminal Appeals' decision in *Ex Parte Patterson*, 740 S.W.2d 766 (Tex. Crim. App. 1987), Texas law did not require that an accused be notified that the state would seek to prove that he used a deadly weapon in the commission of the offense. Because *Patterson* was decided after Piraino's trial, the notice requirement imposed by that decision was not in effect at the time Piraino committed the offense for which he was convicted. Thus, he cannot assert that he relied on the rule of law announced in *Patterson* at the time he engaged in his unlawful conduct. Consequently, the court's subsequent decision in *Ex Parte Beck*, 769 S.W.2d 525 (Tex. Crim. App. 1989), which modified *Patterson*, did not result in an unconstitutional deprivation of fair warning. There was no violation of the Due Process Clause or the *Ex Post Facto* Clause.

III.

THERE IS NO CONSTITUTIONAL INFIRMITY IN THE *ALLEN* CHARGE WHICH WAS GIVEN TO PIRAINO'S JURY.

Piraino was charged with the first-degree felony offense of murder, and was found guilty of the third-degree felony offense of involuntary manslaughter (Transcript, hereinafter "Tr.," 57). Thereafter, following a separate hearing on punishment, the jurors interrupted their deliberations to inquire of the trial

court what would happen if they failed to reach a verdict, and the court instructed them to "please continue your deliberations" (Tr. 65). Subsequently, the jury advised the court that it had "reached an 11-1 impass" [sic] (Tr. 69), following which the court instructed the jury as follows:

> Members of the Jury:
>
> It would be necessary for the Court to declare a mistrial in Cause Number 470951 if the jury found itself unable to arrive at a unanimous verdict after a reasonable length of time; the indictment will still be pending, and it is reasonable to assume the case will be tried again with the same questions to be determined by another jury and with no reason to hope such other jury would find the questions any easier to decide.
>
> The length of time the jury would be required to deliberate is within the discretion of the Court, and the Court does not at present feel the jury has deliberated a sufficient length of time to fully eliminate the possibility of its being able to arrive at a verdict.

(Tr. 71). Following this instruction, the jury assessed punishment of imprisonment for six years and a $5,000 fine (Tr. 72).

In *Lowenfield v. Phelps*, ___ U.S. ___, 108 S.Ct. 546 (1986), the Court rejected the petitioner's claim that the jury was improperly coerced at the punishment phase of his capital murder trial by an *Allen* charge and by polling of the jurors to determine

their numerical division. Because there is no meaningful distinction between *Lowenfield* and the case at bar, *Lowenfield* controls the disposition of Piraino's claim. The *Lowenfield* Court approved the charge even though it came in a capital case, which "'calls for a greater degree of reliability when the death sentence is imposed.'" *Id.* at ___, 108 S.Ct. at 551, quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Here, by contrast, Piraino received a sentence of six years imprisonment -- less than the possible maximum of ten years, Tex. Penal Code Ann. § 12.34(a) -- and a $5,000 fine. Further, the charge in Piraino's case was less coercive on its face than the *Lowenfield* charge because it was not accompanied by polling of the jurors, as in *Lowenfield*.

Piraino argues that the charge was coercive because it "omitted any reference to burden of proof, failed to state that the defendant was to be acquitted if there was a reasonable doubt as to guilt, omitted a clear statement that majority, as well as minority, should re-examine their position, and omitted any caution as to effect of the charge." (Petition at 9-10). The Eighth Circuit decision upon which Piraino relies is not consistent with *Lowenfield*, which requires none of the above instructions. Further, the charge in *Allen v. United States*, 164 U.S. 492 (1896), was approved even though it arguably was more coercive than the one in Piraino's case because it "urged the minority to consider the views of the majority, and ask themselves whether their own views were reasonable under the circumstances." *Lowenfield*, ___ U.S. at ___, 108 S.Ct. at 550. There is no merit to Piraino's *Allen* claim.

CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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